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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LUCY THIRY, Plaintiff and Respondent, v. PET PARTNERS, INC. et al., Defendants and Appellants.	E070851 (Super.Ct.No. RIC1603003) OPINION

APPEAL from the Superior Court of Riverside County. Daniel A. Ottolia, Judge. Affirmed.

No appearance for Plaintiff and Respondent.

Magarian & Dimercurio, Mark D. Magarian and Krista L. Dimercurio for Defendants and Appellants.

Lucy Thiry sued her former employers Pet Partners, Inc., and Barney's Pets, Inc., (defendants) alleging she was terminated as retaliation for her blowing the whistle on and refusing to be complicit in defendants' unlawful activities and as retaliation for her taking medical leave. Inter alia, Thiry alleged various causes of action for violations of the Labor Code, the Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.), the Moore-Brown-Roberti Family Rights Act (CFRA; Gov. Code, §§ 12945.1, 12945.2) (the latter of which is part of the FEHA), the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq.), wrongful termination in violation of public policy, and intentional and negligent infliction of emotional distress.

Following a jury trial, judgment was entered for defendants, and they moved for an award of costs, including expert witness fees pursuant to Code of Civil Procedure section 998. Thiry moved to strike the costs in their entirety because FEHA permits ordinary costs and expert witness fees to a prevailing defendant only if the plaintiff's claims are objectively frivolous, and defendants did not argue, let alone demonstrate, her claims were frivolous. The trial court agreed and struck defendants' costs. Defendants appeal contending the trial court abused its discretion. We find no error and affirm.

I.

PROCEDURAL BACKGROUND

In her complaint, Thiry alleged causes of action for whistleblower retaliation (Lab. Code, § 1102.5 (1st & 2d causes of action)); violation of the CFRA (3d through 5th causes of action); violation of the FEHA (6th through 9th causes of action); wrongful

termination in violation of public policy (10th cause of action); intentional and negligent infliction of emotional distress (11th & 12th causes of action); and unfair business practices in violation of the UCL (13th cause of action). Thiry rejected defendants' Code of Civil Procedure section 998 offer to compromise for $10,000.

A jury rendered verdicts for defendants on the whistleblower, CFRA, FEHA, wrongful termination, and UCL causes of action. (Thiry did not pursue her emotional distress claims to trial.) The trial court thereafter entered judgment for defendants and awarded costs to be determined. In a memorandum of costs, defendants prayed for a total award of $51,804.59 for filing fees, jury fees, deposition costs, costs for service of process, witness fees, court reporter fees, and the costs of preparing models and exhibits for trial.

Thiry moved to tax or strike defendants' costs, contending: (1) pursuant to *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97 (*Williams*) and this court's decision in *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc*. (2018) 19 Cal.App.5th 525 (*Arave*), defendants were not entitled to their costs because Thiry's FEHA claims were not frivolous; (2) defendants' request for expert witness fees pursuant to Code of Civil Procedure section 998 were unreasonable; (3) the expert witness fees for a witness who did not testify at trial were not reasonably necessary; and (4) an award of costs against Thiry would be an undue hardship.

Relevant here, defendants opposed Thiry's motion to tax or strike costs contending this lawsuit was a Labor Code whistleblower case through and through and, notwithstanding *Arave, supra*, 19 Cal.App.5th 525, it was not subject to the limitation on an award of costs to the prevailing defendant on nonfrivolous FEHA claims. Defendants noted *Arave* conflicts with the decision in *Sviridov v. City of San Diego* (2017) 14 Cal.App.5th 514 (*Sviridov*), expressed their disagreement with *Arave*, but stated "neither case changes the outcome as this was a whistleblower case." Defendants acknowledged *Arave* had remanded for the trial court to apportion costs between FEHA claims and non-FEHA claims, but they argued Thiry's whistleblower allegations were inextricably linked to her FEHA claims and, thus, an award of all costs was appropriate because it was impossible to apportion them.

In her reply, Thiry argued the "central issue in this case was whether or not [her] right to take a job protected medical leave guaranteed by the FEHA was violated"—not her Labor Code whistleblower claims. (Fn. omitted.) According to Thiry, "Whether or not this case arose under the FEHA depends solely and exclusively on whether or not the Complaint allege[d] violations of the FEHA." Because "[t]he majority of the claims alleged in the Complaint are under the FEHA," Thiry argued defendants' ability to recover costs was governed by *Williams* and *Arave*. Although Thiry argued defendants should recover *no* costs because her nonfrivolous claims mostly arose under FEHA, she nonetheless suggested the trial court could apportion 80 percent of the case to the FEHA

claims and 20 percent to the non-FEHA claims and make an award to defendants of 20 percent of their costs.

At the hearing on Thiry's motion to strike or tax costs, the trial court noted Thiry's primary argument was that the lawsuit was "in substantial part" based on her FEHA claims, and FEHA only authorized costs to the prevailing defendants if her claims were frivolous. Defendants presented "no argument or evidence that plaintiff's FEHA claims [were] frivolous" and, instead, argued Thiry's "Labor Code whistleblower claims predominate and cannot be separated from the FEHA claims so the full amount of costs should be awarded to them." The court indicated its tentative ruling was to grant Thiry's motion. "[T]he Court feels that an award to the defendants would ignore the FEHA policy requirement for the defendant to show that plaintiff's claims under the FEHA are frivolous. The defendants have indicated that the costs are so intertwined that they cannot be differentiated. The FEHA policy prevails; therefore, the Court will grant the motion to strike the costs in their entirety."

Counsel for defendants addressed the split in authority between *Arave* and *Sviridov* but argued "the [section] 998 analysis still needs to take place" because, "when you look at the totality of the case, this is a Labor Code case, and the courts are very clear that that analysis has to be performed separate from the FEHA analysis."

The trial court stood by its tentative decision and granted Thiry's motion to strike defendants' costs.

Defendants timely appealed.

II.

DISCUSSION

"The trial court's exercise of discretion in granting or denying a motion to tax costs will not be disturbed if substantial evidence supports its decision." (*Rostack Investments, Inc. v. Sabella* (2019) 32 Cal.App.5th 70, 80.)

Defendants contend there are two issues on appeal: (1) Did the trial court abuse its discretion by following this court's decision in *Arave, supra,* 19 Cal.App.5th 525, instead of the decision of our colleagues in *Sviridov, supra*, 14 Cal.App.5th 514, when it concluded a prevailing defendant in a FEHA case cannot recover costs, including expert witness costs under Code of Civil Procedure section 998, absent a finding that the plaintiff's claims were frivolous? And, (2) did the trial court abuse its discretion by not awarding defendants all their costs because Thiry's non-FEHA claims are not subject to the frivolity requirement and those claims predominated in this case?[1] We answer both questions, "No."

[1] Thiry did not file a respondent's brief. Therefore, we "may decide the appeal on the record, the opening brief, and any oral argument by the appellant." (Cal. Rules of Court, rule 8.220(a)(2).) "Nonetheless, [defendants] still bear[] the 'affirmative burden to show error whether or not the respondent's brief has been filed,' and we 'examine the record and reverse only if prejudicial error is found.'" (*Smith v. Smith* (2012) 208 Cal.App.4th 1074, 1078.)

We need not provide a detailed or exhaustive recounting of this court's decision in *Arave, supra*, 19 Cal.App.5th 525. In a nutshell, we held expert witness fees under Code of Civil Procedure section 998 to a prevailing defendant in a FEHA case are subject to the same frivolity standard as ordinary costs under Code of Civil Procedure section 1032 to the prevailing defendant in a FEHA case. We arrived at that conclusion by extending the analysis of *Williams, supra*, 61 Cal.4th 97, which had: (1) interpreted the FEHA costs statute (Gov. Code, § 12965, subd. (b)) to incorporate the frivolity standard applicable to attorney fees under certain federal civil rights statutes (see *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412), and (2) held that statute to be an express exception to the general cost statute, which provides for costs as a matter of right to the prevailing party (Code Civ. Proc., § 1032). (*Arave*, at pp. 548-556.)

Our colleagues in Division Eight of the Second Appellate District succinctly summarized our reasoning thusly: "Government Code section 12965(b) is an express exception to Code of Civil Procedure section 1032, subdivision (b). Section 998 'operates only as an adjustment to cost awards under Section 1032(b), [so] it follows that Section 12965(b) overrides Section 998(c) . . . . [I]f a defendant may not *obtain* an award of costs under Section 1032(b) [because] plaintiff's claim[s] are nonfrivolous, the trial court may not *augment* an award of costs by awarding expert witness fees under Section 998(c).'" (*Huerta v. Kava Holdings, Inc.* (2018) 29 Cal.App.5th 74, 84 (*Huerta*), quoting *Arave, supra*, 19 Cal.App.5th at p. 553.) And in *Arave*, we expressly rejected the

contrary conclusion of our colleagues in Division One of the Fourth Appellate District in *Sviridov, supra*, 14 Cal.App.5th 514.[2] (*Agave*, at pp. 554-555.)

For obvious reasons, we find the trial court did not abuse its discretion when it followed *Arave* and implicitly declined to follow *Sviridov*. Under well-settled principles of stare decisis, the superior courts are bound by all published decisions of the Court of Appeal, but they are free to choose which appellate decision to follow when faced with a split in authority. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456 [when "appellate decisions are in conflict" a "court exercising inferior jurisdiction can and must make a choice between the conflicting decisions"]; accord, *Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 101, fn. 7; *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4.) Because appeals from the Superior Court of Riverside County are normally reviewed by this court, it was wise of the trial court to follow *Arave*. (*McCallum*, at p. 315, fn. 4 ["As a practical matter, a superior court ordinarily will follow an appellate opinion emanating from its own district [or division] even though it is not bound to do so."]; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 14:195, p. 14-82; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 497, p. 558.)

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[2] The plaintiff in *Sviridov* argued that, pursuant to *Williams, supra*, 61 Cal.4th 97, a trial court could only award costs under Code of Civil Procedure section 998 to a prevailing defendant in a FEHA case if it concluded the plaintiff's claims were objectively frivolous. (*Sviridov, supra*, 14 Cal.App.5th at pp. 516-517.) The appellate court disagreed. "[A] blanket application of *Williams* to preclude section 998 costs unless the FEHA claim was objectively groundless would erode the public policy of encouraging settlement of such cases." (*Id.* at p. 521.)

We continue to believe *Arave* was correctly decided, so we decline defendants' invitation to issue a published decision revisiting the issue decided therein. (See *Huerta, supra*, 29 Cal.App.5th at p. 84 ["We find *Arave*'s logic unassailable."].) Defendants did not argue below and do not argue here that Thiry's causes of action were objectively frivolous so, pursuant to *Arave*, they were not entitled to their costs or expert witness fees on Thiry's FEHA claims.

Nor do we conclude the trial court abused its discretion by declining to apportion costs between Thiry's FEHA and non-FEHA claims. The plaintiff in *Arave* alleged causes of action under FEHA and wage claims under the Labor Code, and the jury returned defense verdicts on all claims brought to trial. (*Arave*, *supra*, 19 Cal.App.5th at pp. 532-533.) Although this court reversed the award to the defendant in that case of ordinary costs and expert witness fees on the plaintiff's FEHA causes of action, because the claims were nonfrivolous, we expressly noted the defendant was not precluded from recovering ordinary costs and expert witness fees on the plaintiff's wage claims. (*Arave*, at pp. 548, 556.) Because we were unable to make an apportionment between the FEHA and non-FEHA claims on the record before us, we remanded for the trial court to do so in the first instance. (*Arave*, at p. 556.)

In their opposition to Thiry's motion to tax and strike costs, and again at the hearing, defendants took the position that an apportionment of costs was impossible because Thiry's FEHA claims were based upon and intertwined with her allegations of whistleblower retaliation. Because the FEHA aspects of the case could not realistically be separated from the whistleblower aspects of the case, defendants argued the trial court

should in effect treat the lawsuit as a pure Labor Code case and award defendants all their costs. Thiry took the contrary position and argued the crux of the case was the FEHA violations, so the court should deny all costs to defendants because her claims were nonfrivolous. At most, Thiry argued the court could apportion 20 percent of the case to non-FEHA issues and award costs appropriately.

In its oral ruling granting Thiry's motion to strike, the trial court essentially accepted defendants' argument about the nature of the case and made an implicit finding of fact that the FEHA and whistleblower causes of action were intertwined, and an apportionment was impossible. But, the court concluded the strong FEHA policy of precluding an award of ordinary costs and expert witness fees to the prevailing defendants on nonfrivolous claims prevailed. We agree with the trial court. Defendants present no persuasive argument why the FEHA's policy of encouraging plaintiffs to bring nonfrivolous claims would not be undermined if the trial court were to award defendants their costs. That Thiry's FEHA claims may have[3] been based upon the same facts as her whistleblower claims does not convert the FEHA claims into non-FEHA claims or, in any way, override the strong public policy.

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[3] We say the FEHA claims *may have* been based on the same facts as the whistleblower claims because the record on appeal does not include the transcripts of trial testimony or the exhibits admitted at trial. In any event, defendants do not challenge the trial court's implicit factual finding that the FEHA and non-FEHA aspects of the case are inextricably intertwined, and we must presume it is supported by substantial evidence. (See *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 808 ["trial court's unchallenged findings are presumed to be correct"]; *PR/JSM Rivara LLC v. Community Redevelopment Agency* (2009) 180 Cal.App.4th 1475, 1486 ["Given that the opening brief does not challenge this factual finding, it is presumed correct on appeal."].)

III.

DISPOSITION

The order granting Thiry's motion to strike or tax costs is affirmed. Each party shall bear their own costs.[4] (Cal. Rules of Court, rule 8.278(a)(5).)

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McKINSTER
Acting P. J.

We concur:

CODRINGTON
J.

RAPHAEL
J.

[4] Although the prevailing party is typically entitled to costs on appeal (see Cal. Rules of Court, rule 8.278(a)(1)), Thiry prevailed here despite not filing a brief. (See, *ante*, fn. 1.) We decline to award costs to Thiry in such a circumstance.